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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 508

S. H. KRESS & COMPANY,
Petitioner,

vs.

ELIE P. AGHNIDES AND CHASE BRASS & COPPER CO., INC.,
Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Respondents' Brief opposing the Petition for Certiorari raises a number of specific questions that are herewith answered as follows:

THE RECENT DISMISSALS OF PENDING CASES.

Respondents' Brief now advises that **after** the filing of this Petition for Writ of Certiorari on September 27, 1957, certain cases involving the subject patent were dismissed by Respondents on October 14, 1957 and October 17, 1957.

Two important reasons stated in support of the Petition for Certiorari were (1) the conflict of Opinions between the Seventh and Fourth Circuits, and (2) the existence of a substantial amount of pending litigation, now thrown into a state of confusion by the conflict of Opinions.

Although the two dismissed cases had, heretofore, involved considerable Court action,[1] the said dismissals were **with prejudice**, despite the fact that Respondents had successfully sustained the validity of the patent in the Fourth Circuit.

In view of Respondents' opposition to this Petition, we submit that the dismissals **with prejudice** were intended solely for the purpose of arguing to this Court against the granting of this Petition.

We believe that the importance of this Court's resolving the conflict in Opinions of Circuit Courts of Appeals remains unaffected by Respondents' actions which took place **subsequent** to the filing of the Petition herein.

THE QUESTIONS OF GREAT PUBLIC IMPORTANCE RELATING TO FRAUD, OR TO THE MISUSE OF THE PATENT UNDER THE INTERNATIONAL PATENT CONVENTION.

The facts and law which support Petitioner's charges of fraud and misuse of the patent have been fully examined in Petitioner's Main Brief, at pp. 10 to 17. The Respondents' argument opposing the grant of Certiorari on these questions requires some brief comment.

(a) In attempting to avoid the impact of the case of *Keystone-Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 244; 54 S. Ct. 146, 147, on Aghnides' false pre-trial testimony, Respondents argue that Aghnides' false testimony "was simply a natural mistake" (Respondents' Brief, p. 7). By this admission, that Aghnides' testimony was not correct, the Respondents now confirm that the District Court Judge's Denial (1 App. 89-93), of Kress' Mo-

1. *Aghnides et al.* v. *Holden et al.*, 226 F. 2d 949 (Appendix C in the Petition—pages xxvi to xxx).
Marshall Metal Products, Inc. et al. v. *Aghnides*, 126 F. Supp. 850; (Also see 126 F. Supp. 849 and a related case at 117 F. Supp. 839).

tion to Reopen the trial of the case, was predicated upon the Judge's erroneous understanding (1 App. 90) of Aghnides' deposition testimony. The fact is that Aghnides' untruth (or "natural mistake" as referred to by Respondents) **did** operate to "cover up" and prevent further inquiry into the true facts.[2]

(b) Respondents do not now deny that Aghnides has made **contradictory** statements in the United States and Canada, but seek to explain away such contradictions as being "made by his solicitors" (Respondents' Brief, p. 9). However, a patentee may not avoid the consequences of his representations simply because they were made through an attorney or solicitor.[3]

(c) With respect to the issue arising under the International Patent Convention, which issue is one of first impression before this Court, the Petition alleges that the patent in suit is unenforceable because either Aghnides' United States patent was procured by fraud under the Convention, or was thereafter used to perpetrate a fraud on Canada. In response to that charge, Respondents argue that no fraud was perpetrated in Canada and say (Respondents' Brief, page 10):

> "* * * All of the information needed to determine the relationship and effect of the several Aghnides ap-

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2. See footnote No. 9 on page 10 of Petitioner's Main Brief.

3. That type of argument was best answered by Judge Learned Hand in the case of *Sarazin, et al.* v. *Wright Aeronautical Corp.*, 162 F. 2d 960 (affirming 54 F. Supp. 244, referred to in footnote No. 10 on page 12 of the Petition), for when counsel in the *Sarazin et al.* case sought to explain away critical admissions made in a foreign patent, the Second Circuit Court rejected such argument and stated, at page 963:

> "* * * Sarazin's attorneys now answer that the language may have been that of his French attorneys, not his own, because he did not sign the application. This evasion was cannot accept: the notion that attorneys should have volunteered so to discredit their client's earlier patents is important only for its hardihood."

plications was before the Canadian Patent Office, including the fact that the United States application claimed the priority of the Belgian application."

However, what Respondents fail to tell this Court is that Aghnides also told the Canadian Patent Office (1) that the Belgian convention date shown on the United States patent was **in error**; (2) that the Belgian application **did not** disclose the invention disclosed in the United States patent; (3) that the ways and means of achieving the invention was first disclosed in the United States in 1937, and **not** in Belgium in 1934. Each of these statements to the Canadian Patent Office is in direct contradiction to the Findings of Fact and the Opinion of the Fourth Circuit Court in this case, and hence are, apparently, untrue.

Thus, the Respondents' position may be summed up as: the false pretrial testimony concerning the Canadian patent was "a natural mistake"; the statements in the Canadian application, which are direct contradictions of what has been said in the United States, were "made by his solicitors"; and the statements in Canada, which are in complete conflict with the Opinion of the Fourth Circuit, and which apparently are untrue, fail to constitute a fraud.

We submit that Respondents' position is wholly without substance in fact or law, and that all of the foregoing constitutes gross fraud of the type which has been roundly condemned by this Court.

THE QUESTION OF CONFLICT BETWEEN COURTS OF APPEALS.

The Seventh Circuit found patent 2,210,846 invalid in view of the Felten British patent. The Fourth Circuit found patent 2,210,846 to be valid over the same Felten British patent. The same patent and the same prior art is involved in both Opinions. The Opinions are in direct conflict on this same basic set of facts.

Obviously in any two cases tried at different times, certain of the underlying facts will be different. But that is immaterial here, where the **ultimate** finding of fact and conclusion of two Courts of Appeals are in **direct conflict.**

The Petitioners do not deny that the Fourth Circuit's ultimate conclusion re Figure 8 is in conflict with the rule of patent law that has been consistently reiterated by the Court of Customs and Patent Appeals in many patent cases (see Petition, pages 21-22). On this point, Petitioners argue that the fact situations in the CCPA cases are different (Respondents' Brief, p. 16 and footnote). But that is irrelevant, as the conflict relied upon is the **conflict in law** between the Fourth Circuit's opinion and the prior CCPA decisions.

We further call this Court's attention to the fact that in the case of *Aghnides* v. *Goodrie et al.*, No. 160 in the 1954 term of the U. S. Supreme Court, where the same 2,210,846 patent was involved, the Respondent, Aghnides, was there the petitioner, and sought certiorari on the basis of conflict between the Seventh Circuit's Opinion and the Opinion of Judge Hayes of the District Court of the Middle District of North Carolina. In this case the decision below is also by Judge Hayes of the North Carolina District Court, and has now been affirmed by the Fourth Circuit Court. It hardly lies for the Respondent Aghnides to have urged conflict before this Court in 1954 and to deny conflict today.

CONCLUSION.

We submit that the conflict of Circuit Court Opinions, and the public importance of the issue arising under the International Patent Convention, a treaty, and being a question of first impression, requires the grant of this Petition for Writ of Certiorari.

Respectfully submitted,

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October 28, 1957.